Date: December 8, 1998

Case No.: 1988-ERA-33

In the Matter of:

CASEY RUUD,
Claimant,

v.

WESTINGHOUSE HANFORD COMPANY,
Employer.

Appearances:

Robert A. Jones, Esq.
For Complainant

Stuart R. Dunwoody, Esq.
Robert A. Dutton, Esq.
For Respondent

Before: FLETCHER E. CAMPBELL, JR.
Administrative Law Judge

RECOMMENDED DECISION AND ORDER ON REMAND

This matter is before me on remand by the Administrative Review Board ("ARB" or "the Board"). In February of 1988, Complainant, Casey Ruud, filed a complaint against Respondent, Westinghouse Hanford Company (WHC), under the employee protection (whistleblower) provisions of the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C. 5851 (1994), the Toxic Substances Control Act (TSCA), 15 U.S.C. 2622 (1994), the Clean Air Act (CAA), 42 U.S.C. 7622 (1994), the Solid Waste Disposal Act (SWDA), 42 U.S.C. 6971 (1994), the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. 9610, the Safe Drinking Water Act (SWDA), 42 U.S.C. 300j-9(i)(1994) and the Federal Water Pollution Control Act or Clean Water Act (CWA), 33 U.S.C. 1367 (1994).

The parties reached a settlement agreement in 1988, and the then-presiding administrative law judge dismissed the case. However, Secretary Reich voided the dismissal in 1994 because the former administrative law judge had not reviewed the settlement to determine whether the terms were fair, adequate and reasonable. Secretary Reich remanded the case for hearing, and in 1995 the case was referred to me. A hearing was held in Richland, Washington in August of 1995. On March 15, 1996, I issued a recommended decision and order (RD&O) recommending that the parties' settlement agreement be approved and, in the alternative, finding violations of the employee protection provisions of CAA and CERCLA.

The ARB, in its decision and order of remand dated November 10, 1997 ("ARB Remand"), adopted my findings of coverage under CAA and CERCLA and also found coverage under SDWA, which allows exemplary damages, the amount of which is to be decided on remand (ARB Remand at 11). The Board also rejected the proposed settlement agreement. The Board found that, while there was no coercion or fraud in the inducement, the settlement should be rejected on the grounds that (1) the agreement was breached by Respondent's interference with Claimant's subsequent employment at the Savannah River Site; and alternatively (2) the parties did not agree on a material term of settlement, namely the personnel file provision (ARB Remand at 16-8).

Having rejected the proposed settlement, the Board adopted my alternative findings of liability at the Hanford reservation for the period 1986-88 and found an additional adverse action in Respondent's premising of settlement negotiations on an unlawful "gag" provision, which violated public policy (Id. at 19-20). Further, the ARB found that the retaliation at the Savannah River facility constituted continued retaliation because of protected activity at the Hanford reservation and that the record fully supported my finding that the corporate connection between Respondent and Westinghouse Savannah River Company (WSRC) is close enough to attribute the actions of one corporation to the other for purposes of whistleblower protection (Id. at 20, 23). However, "out of an abundance of caution," the Board remanded the case ". . . to give WHC an additional opportunity to defend against the evidence of violation at Savannah River" (Id. at 25). I was further directed to revisit the issue of appropriate relief based on my ultimate findings and to avoid duplicative recovery (Id. at 26). [1]

On remand, Complainant submitted CX-154 through CX-158 as supplemental testimony (in written form) and documentary exhibits on remand. Respondent submitted RX-84 through RX-100 as supplemental testimony and documentary exhibits on remand. All motions to strike were denied except as to a portion of RX-88, as to which the motion was granted (order on motion to strike, June 4, 1998). Both parties filed timely briefs on remand.

[1] The Board's concern was about any recovery that might duplicate Claimant's recovery in a South Carolina state court action settlement. Ruud et al v. Westinghouse Savannah River Co., case no. 94-CP-02-486 (South Carolina Ct. of Common Pleas, 1996).

I. Issue preclusion

In its reply brief, Respondent raised a new argument inspired by a September 14, 1998 decision of the Washington State Superior Court granting Respondent's motion for summary judgment and dismissing Claimant's claims against Respondent that were before that court (RX-99). Respondent argues that, under the doctrine of issue preclusion, Claimant is barred from asserting in this proceeding that Respondent retaliated against him in South Carolina or that Respondent violated the 1988 settlement agreement.

Issue preclusion, also known as collateral estoppel, refers to the principle that "a litigant in one lawsuit may not, in a later lawsuit, assert the contrary of issues actually decided in and necessary to the judgment of the first suit." Slayton v. Willingham, 726 F.2d 631, 633 (10th Cir. 1984); Ewald v. Commonwealth of Virginia, 89 SWD 1 at 4 (Sec'y Apr. 20, 1995). Issue preclusion applies if three requirements are met. First, the issue must have actually been litigated, that is, contested by the parties and submitted for determination by the court. Second, the issue must have been actually and necessarily determined by a court of competent jurisdiction in the first trial. Third, preclusion in the second trial must not work an unfairness. Otherson v. DOJ, 711 F.2d 267, 272-3 (D.C. Cir. 1983); Ewald at 89 SDW 1 at 4.

I find that the doctrine of issue preclusion does not apply here. While it is true that summary judgment can in some instances be given preclusive effect, Exhibitors Poster Exchange, Inc. v. National Screen Service Corp., 421 F.2d 1313, 1319 (5th Cir. 1970), cert. denied, 400 U.S. 991 (1971), in this case the order by the Washington Superior Court judge gave absolutely no explanation for the grounds or reasoning behind his decision and made no findings of fact. He simply ordered that the motion for summary judgment be granted and that all claims in the action be dismissed with prejudice (RX-99). Ruud's complaint in the Washington state action lists nine causes of action, including wrongful discharge in violation of public policy, fraud, breach of contract, intentional interference with contract and negligent infliction of emotional distress (RX-53).

In its memorandum to the Washington court, Respondent offered several different grounds for dismissal of the South Carolina-related claims in support of its motion for summary judgment: first, that Complainant released Respondent in a settlement of Complainant's South Carolina claims; second, that there is no evidence that Complainant or its agents committed any acts relating to plaintiffs' South Carolina claims; and third, that there is insufficient evidence to maintain claims of interference with contract and emotional distress (RX-96). The Washington judgment granting dismissal gives no hint as to which ground or grounds upon which it relies, and, thus, which holdings were actually and necessarily made.

In addition, it is not readily apparent from the evidence submitted whether the standards of proof and shifting of evidentiary burdens are the same in the state claims as they are in the federal statutory claims before me. There is no discussion in Respondent's brief about the degree of similarity between the elements (such as scienter and causation) of the common-law tort claims before the Washington judge and those of the federal statutory claim before me. In Ewald v. Commonwealth of Virginia, 89 SWD 1 at 4 (Sec'y

Apr. 20, 1995), the very case cited by Respondent in much of its argument on this issue, the Secretary of Labor declined to apply issue preclusion from an already-decided first amendment employment case to a related environmental whistleblower case because, in the former case, the burden was on the complainant to show "but for" causation, while, in the latter case, once a complainant makes a prima facie showing that the protected action was "a motivating factor" in the retaliation, the burden fell on the respondent to show that it would have taken the same action even if no improper motive existed. Id. at 6-8. When the burden of proof is different and more stringent in the first case, issue preclusion should not be applied to the second. Whelan v. Abell, 953 F,2d 663, 668 (D.C. Cir. 1992); Newport News Shipbuilding and Dry Dock v. Director, 583 F.2d 1273, 1278-9 (4th Cir. 1978). There is simply not enough evidence that the claims or the burdens of proof in the Washington action are similar enough to those in this action to apply issue preclusion.

II. Reconsideration of the 1998 settlement argument

Respondent urges me once again to recommend that the ARB approve the 1988 settlement agreement. However, in no uncertain terms, the ARB stated: "[W]e decline to approve the parties' proposed settlement" (ARB Remand at 1). In a section labeled, "Rejection of the proposed settlement agreement," the Board found that Respondent breached the personnel file provision of the agreement by interfering with Claimant's prospective employment through retaliation during Claimant's tenure at the Savannah River Site facility (ARB Remand at 16-7). Although the Board did remand the case to give Respondent a further opportunity to refute evidence of the violations at the Savannah River Site facility, and although there is some persuasiveness to the argument that this should include the issue of the breach of the agreement,[2] without specific instructions to the contrary I am bound to follow the explicit language of the Board's remand. I cannot again ask the Board to approve the settlement when it has ruled that it will not approve it and when little if any additional evidence on the subject of breach has been proffered.

III. WHC Responsibility for Retaliation at the Savannah River Site

Respondent has elected to present no new evidence to refute the allegations and the tentative findings by the Board and me that retaliatory conduct took place at the Savannah River Site. (Although Respondent insists in its brief that has not waived any arguments on this issue, it certainly has not made any new arguments or offered any new evidence for me to consider.) Respondent instead argues that WHC is separate from WSRC and cannot be held liable under corporate alter ego theory.

[2] The Board gave an alternative ground for rejecting the settlement that bears a more tenuous connection to the violation at the Savannah River Site (ARB Remand at 18). This further bolsters my interpretation of the Board's remand as not including a re-evaluation of the settlement agreement's validity.

In my original recommended decision, I had found that the corporate connection between WHC and WSRC is close enough to attribute the actions of one corporation to the other for purposes of whistleblower protection (R.D. and O. at 91). The Board stated that, "[the] record fully supports" my finding. Then the ARB went on to cite the same specific factors in reaching this decision that I did as well as others, specifically: (1) employees transfer from one company to another without termination of employment and application for reemployment; (2) WSRC and WHC stock option plans provide for purchase if Westinghouse Electric Corporation stock through the subsidiaries; (3) Thomas Anderson, a president of WHC, testified that it is a common practice for the subsidiaries to share employees on team assignments; (4) three important principals in this case (Anderson, Wise and McCormack) had served as top executives at all three corporations (WHC, WSRC, and Westinghouse). The Board then stated: "We adopt the ALJ's finding that the corporations commonly were liable for purposes of whistleblower discrimination in this case" (ARB Remand order at 20-1).

The evidence submitted on remand has limited persuasive value on this issue. Several of Complainant's current and former employees testified on remand that they did in fact terminate employment with one subsidiary before gong to work for another subsidiary or the parent (RX-85 at 2, RX-87 at 3, RX-88 at 2, RX-90 at 3). These same people testified that the corporations are separate and distinct from each other and that occasional collaboration between two corporations on U.S. Department of Energy (DOE) matters is quite common in the world of DOE contractors (RX-85 at 3-4; RX-86 at 4-3, 32-62; RX-88 at 3; RX-90 at 5). However, I find that these declarations are by individuals with low credibility based on their previous retaliatory actions and their bias as managers or former managers for Respondent. Many of them harbor personal antagonism toward Complainant, and, thus, I assign low persuasive value to their statements. In any case, as of now, the Board's holding on the question of WSRC responsibility constitutes the law of this case.

Respondent relies more on United States v. Bestfoods, 118 S.Ct. 1876 (1998), than on additional evidence on this issue. In Bestfoods, a nonwhistleblower CERCLA case, the Supreme Court held that only when the corporate veil may be pierced as a matter of corporate law [3] can a parent corporation be charged with derivative liability. Id. at 1884. Although Bestfoods concerned one of the statutes relied upon by Complainant here, the CERCLA provisions addressed in Bestfoods are the pollution provisions, not the whistleblower provisions. Id. at 1881. However, I see no basis on which to conclude that the court's analysis would have been different for a whistleblower issue.

It is probable that an application of Bestfoods to the instant case would be a retroactive application, but the Supreme Court has held that Supreme Court precedents are to be retroactively applied. Harper v. Virginia Dept. of Taxation, 509 U.S. 86 (1993);

[3] The Court in Bestfoods did not apply the corporation law of any particular state but apparently some kind of general state corporation law. I have no doubt that, on this record, Complainant has not met the Bestfoods test. Should the Board decide that Bestfoods is pertinent to this case, the record would need to be reopened to receive evidence on the corporate connection in light of Bestfoods.

Reynoldsville Casket Co. v. Hyde, 115 S. Ct. 1745 (1995). In any case, because Complainant has forgone any claim for damages for Savannah River Site violations (Complainant brief at 1), without further instructions from the Board, I will not attempt to make any findings pursuant to Bestfoods.

Assuming that it is currently the law of this case that WHC is liable for discrimination against Ruud at the Savannah River Site, WHC is liable for Ruud's termination of his employment at RI Tech. I have already found that, in 1991, Wise and Jacobi forced Casey Ruud out of his job with RI Tech at the Savannah River site (RD&O at 93). Respondent argues that RI Tech managers could have reassigned Ruud as they did Simkin (citing CX 148 at 229-30). However, I find that RI Tech's objective willingness to reassign Ruud is irrelevant, as there is no evidence that Mr. Wiedrich or anyone else at RI Tech ever actually offered to relocate Ruud. Thus, I affirm my previous finding.

III. Damages

As I am not rerecommending approval of the 1988 settlement, I will proceed to reconsider the issue of damages. In doing so, I am mindful of, among other things, 1) the Board's admonition to "avoid duplicative recovery;" and 2) Complainant's decision to forego any claim for damages relating to the Savannah River Site incidents.

A. Back Pay

Respondent objects to Ruud's "assumption" that he would have received annual pay increases of 4% had he remained a WHC employee. Respondent points out that in 1994 no merit increases were budgeted at WHC (CX 150 at 2). Complainant insists that he was an above-average employee. He argues that 4% is reasonable because it is the "lowest amount of increase actually received by such employees since 1988" (Complainant brief at p. 14). The burden of proof is on Complainant on this as on all issues, and I find that the record contains an insufficient basis for the assumption that a 4% annual increase is a reasonable working figure. However, I do not believe that it is fair to assume no increase for the period 1996 through 1998. Therefore, I will assume pay increases based on the rate of inflation as reflected in the consumer price index, of which I take official notice.

Complainant argues that his percentage increases for purposes of computing back pay should not be limited to "average increases" as argued by Respondent because Ruud was an above-average employee. However, Complainant cites no evidence that Ruud was an above-average employee. I agree that he has shown himself to have been above average in courage and public spiritedness, but, in making a determination as to an award of back pay, I should assume that his whistleblowing activities never occurred. Therefore, I find that the record contains an insufficient basis on which to find that Ruud was, other than in his whistleblowing activities, an above-average employee.

To conclude, in calculating Ruud's back pay, I am adopting the figures contained in the chart at exhibit B of Respondent's reply brief on remand, except that I am assuming cost-of-living increases for 1996 through 1998.

B. Front Pay

Respondent argues that Department of Labor whistleblower cases allow awards of front pay only infrequently and in small amounts. Be this as it may, each case holding represents an attempt to place a whistleblower in an employment position comparable in pay to where he or she would have been had there been no whistleblowing.

Respondent speculates that Ruud's inability to command a salary comparable to his pay at WHC is attributable solely to his lack of a college degree. However, Ruud was able to secure a job at WHC at that salary. The only difference between then and now is Ruud's new-found reputation as a whistleblower. Therefore, I affirm my previous finding except that I accept Complainant's offer to calculate front pay at a discount rate of 3% instead of 4% given recent reductions in actual interest rates and the cost of living.

C. Exemplary damages

In my recommended decision and order, I found that the applicable statutes do not allow for exemplary damages. However, the Board disagreed with me and announced that exemplary damages can be awarded. Further, the Board asked me to calculate them. In my recommended decision and order (p. 97), I hypothetically awarded $12,500.00 based on an award in a comparable case. See Varnadore v. Oak Ridge National Laboratories, 95 CAA 2 (ALJ June 27, 1993). I noted that, on a scale of zero to ten (zero representing blameless non discriminatory conduct and ten representing the most execrable discriminatory conduct), I would place WHC's conduct toward Ruud at about 4.5, whereas I would rate that in Varnadore at about 7.0. I further noted that WHC's conduct was bad enough to justify some exemplary damages but not an astronomical amount.

Ruud argues that $12,500.00 is much too low in light of the seriousness of Respondent's conduct and the need to punish it. As might be expected, Respondent argues that it should not be assessed any exemplary damages because the record does not establish that Respondent intended to violate environmental whistleblower laws. I reject this, as I have found that WHC's discriminatory conduct was deliberate, not accidental. Further, knowledge of the law is not a necessary element of a whistleblower violation. 42 USC 7622 (a); 42 USC 9610 (a); 42 USC 300 j-9(i).

Although I have sympathy for Ruud's argument that $12,500.00 is insufficient to punish and deter discrimination against whistleblowers, I find that comparable case law does not justify a larger assessment. Varnadore, supra; Jones v. EG & G Defense Materials, Inc., 95 CAA 3 at 24 (ARB Sept. 29, 1997). The Board has held that an

important criterion for determining whether an award of compensatory damages is reasonable is whether the award is roughly comparable to awards made in similar cases. Smith v. ESICORP, Inc., 93 ERA 16 (ARB, August 27, 1998).

For these reasons, I affirm an assessment of $12,500.00 in exemplary damages, from which I will deduct one third (which represents the portion of the award that I attribute to WSRC Savannah River Site conduct).

D. Emotional distress

Likewise, I reaffirm my hypothetical findings and assessment concerning damages for emotional distress (RD&O at 96). In light of the Board's analysis in Smith, supra, my hypothetical award in the original recommended decision and order ($15,000.00) seems appropriate, and I affirm it.[4] In cases cited in Smith, supra, the Board approved awards consistent with that which I have recommended here, given that Ruud did not seek and receive medical treatment.[5] As before, I will deduct one third, which represents damages resulting from the Savannah River Site violations.

E. Offsets

1. As stated above, I attribute one third of Complainant's overall whistleblower-related emotional distress to the events that occurred at the Savannah River Site. Because Complainant has elected to forego damages relating to the Savannah River Site, I have reduced the hypothetical award of damages for emotional distress by one third.

2. Complainant seeks an exemption for any offset for the $25,000.00 out of the $115,000.00 paid pursuant to the 1988 settlement which was allocated to Complainant's attorney fees. I see no basis in law or the 1998 settlement terms to do as Complainant asks. The $25,000.00 was part of the settlement. It was paid to Complainant. That he disbursed the funds to his attorney is irrelevant. Therefore, I decline to reduce the offset by the requested $25,000.00.

3. For the same reasons as those stated above at subparagraph D1, I will reduce the recommended award for exemplary damages by one third.

---

[4] The Board did not specifically instruct me to make any further findings on remand concerning damages for emotional distress.

[5] Recourse to medical treatment is important for two reasons: 1) Doctors' reports confirm the existence of symptoms of the distress and 2) they allow an evaluation of the intensity and seriousness of the distress.

F. Attorneys' Fees

The Board has asked me to provide a recommendation as to attorneys' fees. As I am unable to do this until Complainant submits a fully documented fee petition, I will order that such a petition be filed within twenty days and that a response made thereto within ten additional days.

RECOMMENDED ORDER ON REMAND

1. Respondent shall reinstate Complainant in the position that he held prior to his layoff.
2. Respondent shall pay Complainant back pay from and after 1988 as provided in the appendix hereto.
3. Should Respondent refuse to reinstate Complainant, or should the Board find that reinstatement is not feasible, Complainant shall be entitled to front pay calculated on the basis of his remaining expected professional life (including fringe benefits), less the salary he would be expected to earn in his job with the Washington State Dept. of Ecology and the US Dept. of Energy, the remainder being discounted at 3% for its present value.
4. Respondent shall pay Complainant exemplary damages in the amount of $8,337.50 ($12,500.00 x 2/3).

ORDER

Within twenty (20) days of receipt of this recommended decision and order on remand, Complainant's attorney shall file a fully supported and fully itemized fee petition, sending a copy thereof to Respondent's counsel, who shall then have ten (10) days to respond thereto.

FLETCHER E. CAMPBELL, JR.
Administrative Law Judge

FEC/lpr
Newport News, Virginia

APPENDIX

Year	Base Pay	% Increase	$ Increase	Subtotal	% Benefits	$ Benefits	Total	Actua Earn

1988	$35,525	4.0%	$1,421	$36,946	18.80%	$6,946	$43,892	$30,850	$13,042
1989	$36,946	4.75%	$1,755	$38,701	17.80%	$6,889	$45,590	$12,346	$33,244
1990	$38,701	17.21%	$6,660	$45,361	20.60%	$9,344	$54,705	$51,849	$2,856
1991	$45,361	5.4%	$2,450	$47,811	8.33%	$3,983	$51,794	$24,871	$26,923
1992	$47,811	5.0%	$2,391	$50,202	0.0%	$0	$50,202	$40,444	$9,758
1993	$50,202	4.5%	$2,259	$52,461	0.0%	$0	$52,461	$43,020	$9,441
1994	$52,461	0.0%	$0	$52,461	0.0%	$0	$52,461	$49,480	$2,981
1995	$52,461	4.0%	$2,098	$54,559	0.0%	$0	$54,559	$56,487	($1,928)
1996	$54,559	3.3%	$1,800	$56,359	0.0%	$0	$56,359	$55,235	$1,124
1997	$56,359	1.7%	$958	$57,317	0.0%	$0	$57,317	$47,697	$9,620
1998	$57,317	1.4%	$802	$58,119	0.0%	$0	$58,119	$41,652	$16,467

Total Lost Wages	$123,528
1988 Settlement	($115,000)
Back Pay Award	$8,528
exemplary damages	$8,337
Net to Complainant	$16,865